

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,)	4:04CR3084
)	
Plaintiff,)	MEMORANDUM
v.)	AND ORDER
)	
DAVID S. DETWEILER,)	
)	
Defendant.)	

This matter is before the court on the defendant's notice of appeal (filing 95), motion for certificate of appealability (filing 96), and motion for leave to appeal in forma pauperis (filing 97). The pro se notice of appeal was filed with reference to the court's order of December 21, 2007 (filing 94), which denied the defendant's motion for reconsideration of the court's judgment of October 26, 2007 (filing 92), which denied on the merits the defendant's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255.

Before the defendant's appeal can proceed, a certificate of appealability must issue. *See Fed. R. App. P. 22(b)*. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons set forth in the court's memorandum and order of December 21, 2007 (filing 91), granting the government's motion for summary judgment, the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c). The defendant's motion for reconsideration, which the court treated either as a motion to alter or amend judgment filed pursuant to Federal Rule of Civil Procedure 59(e) or as a motion for relief from judgment filed pursuant to Federal Rule of Civil Procedure 60(b), cited additional legal authority but failed to demonstrate that the court's previous analysis might be in error. Therefore, a certificate of appealability will not be issued.

Although the defendant's motion for leave to proceed in forma pauperis is not supported by a financial affidavit, he was determined to be financially unable to obtain an adequate defense in his criminal case, and an attorney was appointed to represent him at trial. Because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis pursuant to Federal Rule of Appellate Procedure 24(a)(3).

IT IS ORDERED that:

1. The defendant's motion for a certificate of appealability (filing 96) is denied, and a certificate of appealability shall not issue in this case;
2. The defendant's motion for leave to appeal in forma pauperis (filing 97) is granted, and the defendant may proceed in forma pauperis; and
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

January 22, 2008.

BY THE COURT:

s/ *Richard G. Kopf*
United States District Judge